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Suffragist Prisoners and the Importance of Protecting Prisoner Protests

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SUFFRAGIST PRISONERS AND THE IMPORTANCE OF PROTECTING PRISONER PROTESTS

*Nicole B. Godfrey**

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I. INTRODUCTION

For the last several years, criminal justice reform has been a pressing political topic, and radical proposals to overhaul the criminal justice system have gained traction.¹ Nearly all of the candidates in the crowded 2020 Democratic presidential primary field introduced comprehensive proposals to curb (or even eliminate) mass incarceration.² The reasons for this new-found political interest in dramatic criminal justice reform are varied and complex, but we can be certain shifting public opinion on the cause and consequences of mass incarceration played some part.³ But why has the public's view of mass incarceration so dramatically shifted? Undoubtedly, public information campaigns and social justice movements have provided the average American more information about the historical and present-day realities of the American criminal justice system.⁴ Studies have found that the more information provided to the average American citizen, the more likely they are to support reforms.⁵

But despite this growing interest in criminal justice reform, prisons remain “the black boxes of our society,”⁶ leaving the public struggling to understand what exactly goes on behind prison walls. Intrepid journalists seeking to shed some light on what goes on behind the walls of the thousands of prisons dotting the American landscape have published important exposés in recent years,⁷ but the voices of incarcerated persons

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1. See, e.g., Timothy Williams & Thomas Kaplan, *The Criminal Justice Debate Has Changed Drastically. Here's Why*, N.Y. TIMES (Aug. 20, 2019), <https://www.nytimes.com/2019/08/20/us/politics/criminal-justice-reform-sanders-warren.html> [https://perma.cc/5KU8-BVB4].

2. *Id.*

3. *Id.*

4. Examples of such public information campaigns and movements include: *Stop Solitary Campaign*, ACLU, <https://www.aclu.org/other/stop-solitary-advocacy-campaign-tools> [https://perma.cc/69PT-ZHKT]; *Prison Gerrymandering Project*, PRISON POL'Y INITIATIVE, <https://www.prisonersofthecensus.org/>, [https://perma.cc/HR7N-JT6A]; *Prison Phone Justice*, HUM. RIGHTS DEFENSE CTR., <http://www.prisonphonejustice.org> [https://perma.cc/ED39-KCD2]; PRISON POL'Y INITIATIVE, <https://www.prisonpolicy.org/blog/2015/09/29/state-reform-phones/> [https://perma.cc/FBE3-QGXU]; *The State of Justice Reform 2018*, VERA, <https://www.vera.org/state-of-justice-reform/2018/the-state-of-bail> [https://perma.cc/N2SB-8EKE].

5. Memorandum from Danny Franklin & Benenson Strategy Group on Criminal Justice System Survey Results to Interested Parties, (Nov. 13, 2017), <https://www.aclu.org/report/smart-justice-campaign-polling-americans-attitudes-criminal-justice-topline-memo> [https://perma.cc/E57Z-AB9H].

6. Shaila Dewan, *Inside America's Black Box: A Rare Look at the Violence of Incarceration*, N.Y. TIMES (Mar. 30, 2019), <https://www.nytimes.com/2019/03/30/us/inside-americas-black-box.html?smid=nytcore-ios-share> [https://perma.cc/5J52-SYNA].

7. See, e.g., Aviva Stahl, *Force-Feeding Is Cruel, Painful, and Degrading—and American Prisons Won't Stop*, NATION (June 4, 2019), <https://www.thenation.com/article/force-feeding-prison->

can often be lost in the conversation.⁸ Recognizing this loss, certain journalistic outlets have made a concerted effort in recent years to publish pieces written by those living inside the walls.⁹ Hearing the voices and stories of those living inside the system is crucially important to understanding the flaws of the criminal justice system and exposing illegal conditions of confinement.¹⁰ This is particularly true for those institutions that are either notoriously opaque¹¹ or infamously brutal.¹² But despite the

supermax-torture/ [https://perma.cc/7Q4G-7YMH] (describing the force-feeding tactics utilized on prisoners engaging in hunger strikes at the nation's federal supermax); Jennifer Gonnerman, *Do Jails Kill People?*, NEW YORKER (Feb. 20, 2019), <https://www.newyorker.com/books/under-review/do-jails-kill-people> [https://perma.cc/GW6Z-6ZC6] (noting that the well-known New York City jail on Rikers Island "has long been notorious for its culture of brutality"); Annie Correal, *No Heat for Days at a Jail in Brooklyn Where Hundreds of Inmates Are Sick and 'Frantic'*, N.Y. TIMES (Feb. 1, 2019), <https://www.nytimes.com/2019/02/01/nyregion/mdc-brooklyn-jail-heat.html> [https://perma.cc/4RVN-RQP8] (recounting the experience of federal detainees "stuck in freezing cells" with little to no power or heat for at least a week); German Lopez, *America's prisoners are going on strike in at least 17 states*, VOX (Aug. 22, 2018), <https://www.vox.com/2018/8/17/17664048/national-prison-strike-2018> [https://perma.cc/TE5R-7BCM] (describing the work and hunger strike planned by prisoners across the country from August 21 to September 9, 2018); Shane Bauer, *My Four Months as a Private Prison Guard: A Mother Jones Investigation*, MOTHER JONES (July/August 2016), <https://www.motherjones.com/politics/2016/06/cca-private-prisons-corrections-corporation-inmates-investigation-bauer/> [https://perma.cc/NW9K-EMQZ] (describing cells that look like tombs, guards using force on a prisoner who just had open-heart surgery as "all part of the bid'ness," and the reporter's own priorities changing as "[s]triving to treat everyone as human takes too much energy."); Mark Binelli, *Inside America's Toughest Federal Prison*, N.Y. TIMES MAG. (Mar. 26, 2015), <https://www.nytimes.com/2015/03/29/magazine/inside-americas-toughest-federal-prison.html> [https://perma.cc/S4EB-ZB38] (recounting tales of self-mutilation, psychosis, and suicide at the federal supermax prison, where all prisoners are held in solitary confinement).

8. This lack of input from the persons living inside prison can often be attributed to lack of media access to prisoners.

9. See, e.g., *Life Inside*, MARSHALL PROJECT, <https://www.themarshallproject.org/tag/life-inside> [https://perma.cc/CJ5Y-Z336] (a weekly newsletter delivering "first-person essays from those who work or live in the criminal justice system," including prisoners); *Voices from Solitary*, SOLITARY WATCH, <https://solitarywatch.org/category/voices/> [https://perma.cc/S6HR-P6KB] (featuring first-person pieces from those suffering in solitary confinement in the nation's prisons and jails).

10. See generally Laura Rovner, *On Litigating Constitutional Challenges to the Federal Supermax: Improving Conditions and Shining a Light*, 95 DENV. L. REV. 457, 460–64 (discussing the invisibility of prisons as compared to the other aspects of the criminal justice system); Andrea Armstrong, *No Prisoner Left Behind? Enhancing Public Transparency of Penal Institutions*, 25 STAN. J.L. & POL'Y 435, 462–66 (2014) (discussing the lack of transparency of penal institutions).

11. See, e.g., Jeanne Theoharis, *I Tried to Tell the World About Epstein's Jail. No One Wanted to Listen*, ATLANTIC (Aug. 16, 2019), https://www.theatlantic.com/ideas/archive/2019/08/real-scandal-mcc/596257/?utm_source=atl&utm_medium=email&utm_campaign=share [https://perma.cc/H5EA-2QEP] (discussing the "hidden in plain sight" horrors of the federal prison system and the difficulty of investigating those conditions); Rovner, *supra* note 10, at 464 (discussing the invisibility of the federal supermax-the United States Penitentiary-Administrative Maximum (ADX)).

12. Shaila Dewan, *Inside America's Black Box: A Rare Look at the Violence of Incarceration*, N.Y. TIMES (Mar. 30, 2019), <https://www.nytimes.com/2019/03/30/us/inside-americas-black>

effort to feature incarcerated voices by some news organizations, the 2.2 million people currently confined to American prisons and jails are largely out of sight and mind for most of the public.¹³

This lack of visibility is purposeful and is perpetuated by a lack of independent monitoring of prisons and jails¹⁴ and by the leniency afforded to prison systems by the federal courts.¹⁵ In 2006, the Commission on Safety and Abuse in America's Prisons released a report documenting troubling conditions in the nation's prisons and jails and calling for an independent, external monitor of prison systems in order to increase transparency and accountability in the nation's carceral institutions.¹⁶

Every public institution—hospitals, schools, police departments, and prisons and jails—needs and benefits from strong oversight. Perhaps more than other institutions, correctional facilities require vigorous scrutiny: They are uniquely powerful institutions, depriving millions of people each year of liberty and taking responsibility for their security, yet are walled off from the public.¹⁷

Without an external system of checking their power, prison systems across the country are free to operate with little transparency and accountability.¹⁸ This lack of external accountability allows prison systems to become “a place that is so foreign to the culture of the real

box.html?smid=nytcare-ios-share [https://perma.cc/8EWZ-WPKQ] (describing photographs received by the New York Times of weapons and bloody crime scenes inside the St. Clair Correctional Facility in Alabama); Gonnerman, *supra* note 7 (noting that the well-known New York City jail on Rikers Island “has long been notorious for its culture of brutality.”); Matthew Teague, *‘It’s a bloodbath’: staff describe life inside America’s most violent prison*, GUARDIAN (Oct. 21, 2016), <https://www.theguardian.com/us-news/2016/oct/21/holman-prison-alabama-guard-speaks-out> [https://perma.cc/6AX6-FEWF] (describing “[t]he horrors of Holman penitentiary in southern Alabama—the stabbings, riots, fires, abuse—[that] have earned it a reputation as the most violent prison in the United States.”).

13. Dewan, *supra* note 12.

14. Human Rights Watch, *No Equal Justice: The Prison Litigation Reform Act in the United States*, at 3 (Jun. 2009), <https://www.hrw.org/sites/default/files/reports/us0609web.pdf> [https://perma.cc/AH4E-PKBZ] (“Unlike many other democracies, the United States has no independent national agency that monitors conditions in prisons, jails, and juvenile facilities and enforces minimal standards of health, safety, and humane treatment.”).

15. See, e.g., *Turner v. Safley*, 482 U.S. 78, 89 (1987) (announcing reasonable relationship standard as governing all challenges to prison regulations).

16. Vera Institute of Justice, *Confronting Confinement: A Report of the Commission on Safety and Abuse in America’s Prisons*, at 15–16, 21–22 (2006), https://storage.googleapis.com/vera-web-assets/downloads/Publications/confronting-confinement/legacy_downloads/Confronting_Confinement.pdf [https://perma.cc/LN6R-6VFT] (“Corrections leaders work hard to oversee their own institutions and hold themselves accountable, but their vital efforts are not sufficient and cannot substitute for external forms of oversight.”).

17. *Id.* at 77.

18. *Id.* at 16.

world” that any attempts to self-police flatly fail, and prison officials are placed under extreme pressure to “keep quiet” about any obvious problems.¹⁹

Without appropriate external oversight, public accountability of prison systems often occurs only in those rare instances where a prisoner successfully challenges a condition of his incarceration in federal court.²⁰ But a 1987 Supreme Court decision severely limits the First Amendment rights of prisoners.²¹ In *Turner v. Safley*, the Supreme Court embedded into prisoner First Amendment jurisprudence a requirement that federal courts defer to the professional judgment of prison officials when considering whether a prison regulation violates a prisoner’s constitutional rights.²² In theory, this deference should not be absolute, but, in practice, *Turner* deference has allowed prison officials to abuse the discretion afforded them under the doctrine.²³ Therefore, prisoner speech is subjected to a high-level of censorship that limits the ability of prisoners to protest or otherwise expose inhumane conditions of confinement. Indeed, those prisoners who engage in such protected activity are often subjected to retaliation, which further chills their willingness to speak out against the abusive practices of their jailers.

This Article argues for increased protections for prisoners who choose to protest the conditions of their incarceration. By strengthening the protections afforded to prisoner protests, I submit that federal courts can increase the accountability of prison officials and further the democratic and societal values embedded in the First Amendment’s free speech protections. To advance this argument, I’ve chosen to use the acts of protest utilized by the Silent Sentinels—the women jailed because of their protest activities in support of the Nineteenth Amendment—as an example demonstrating why in-prison protest is worthy of robust constitutional protections.

The Article proceeds in three parts. First, I provide the historical background necessary to understand the utility of the Silent Sentinels

19. *Id.* at 79, 82.

20. *Id.* at 22.

21. *See generally Turner*, 482 U.S. 78.

22. *Id.* at 84–85 (“Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint. Where a state penal system is involved, federal courts have . . . additional reason to accord deference to the appropriate prison authorities.”).

23. David M. Shapiro, *Lenient in Theory, Dumb in Fact: Prison, Speech, and Scrutiny*, 84 GEO. WASH. L. REV. 972, 995 (2016) (recounting how “corrections officials abuse, with some frequency, the discretion granted to them by *Turner* and its progeny”).

example. This discussion includes a description of the conditions of the prison in which the Silent Sentinels were incarcerated, an account of the type of protest speech utilized by the Silent Sentinels from within prison, and an explanation of the consequences of the women's protest activity. From there, Part II provides an analysis of the law governing prisoner protest activity when viewed through the lens of free speech, including a thorough discussion of the *Turner* standard and the limitations placed on prisoner protest activities because of that standard. Part II then examines the compelling critiques of the *Turner* standard articulated by other scholars and introduces the argument that more robust protections of prisoner protest activities are both possible and necessary. Finally, the Article argues that the example of the Silent Sentinels provides a compelling lens through which one can examine the utility of protecting prisoner protest rights. Part III begins by critically analyzing the utility of the Silent Sentinels example and cataloguing anticipated critiques to using this lens through which to argue for change in the current criminal justice system. By examining how the Silent Sentinels' in-prison protest furthered critical First Amendment values, Part III concludes by comparing the Silent Sentinels' protest to modern prisoner protest activities and arguing that the Silent Sentinels' experience demonstrates why we should support robust protections of prisoner protest rights.

II. THE SILENT SENTINELS

On January 10, 1917, a group of women organized by Alice Paul, Lucy Burns, and the National Woman's Party (NWP) began a two-and-a-half-year protest in support of women's suffrage.²⁴ The first group of American citizens to picket the White House, a dozen women gathered outside the White House gates on that January day, carrying purple, white, and gold banners.²⁵ Some of the banners read, "Mr. President, what will you do for women's suffrage?," while others stated "How long must women wait for liberty?"²⁶ Causing a "profound stir" on that first day, the picketers returned to protest six days a week for the next several months and then more sporadically until June 4, 1919, when Congress passed the Nineteenth Amendment to the United States Constitution.²⁷

24. DORIS STEVENS, *JAILED FOR FREEDOM: AMERICAN WOMEN WIN THE VOTE* 21 (Carol O'Hare, ed., 1995).

25. *Id.* at 59.

26. *Id.*

27. *Id.*

The picketing women became known as “Silent Sentinels” because, while the women held “banners with provocative political slogans or demanding the right to vote,”²⁸ they stood in peaceful silence.²⁹ While the *New York Times* initially called the picketers “unladylike and ‘silly,’” most other news organizations lauded the women’s efforts.³⁰ “Taking a shift as a sentinel was much harder work than it might appear. The pickets stood outside no matter what the weather, feet frozen and hands numb from holding the heavy banners, subject to taunts from young boys and bemused stares from passerby.”³¹ While the taunts and stares may have been uncomfortable for the picketers, the protests remained largely peaceful for the first several months.³² In fact, President Wilson initially seemed “amused and interested” at the women posted outside the White House.³³

But the President’s toleration of the picketers quickly changed after the United States entered World War I in April 1917.³⁴ The suffragist members of the NWP resolved to continue their work despite the war effort, “being unalterably convinced that in so doing the organization serves the highest interests of the country.”³⁵ The decision to continue picketing despite the United States’ entry into the war cost the NWP a sizable portion of its membership, but the strategy “succeeded in keeping the suffrage cause at the center of public debate.”³⁶

The picketers remained determined to underscore the hypocrisy of President Wilson’s championing of democracy around the world while denying democratic participation to half of the American citizenry.³⁷ To

28. *Id.* at 21.

29. Rivera Sun, *Silent Sentinels Start Suffrage Protest on Jan 10th, 1917*, RIVERA SUN (Jan. 8, 2016), <http://www.riverasun.com/silent-sentinels-start-suffrage-protest-on-jan-10th-1917/> [<https://perma.cc/7ZWK-R8HL>].

30. Lynda G. Dodd, *Parades, Pickets, and Prison: Alice Paul and the Virtues of Unruly Constitutional Citizenship*, 24 J.L. & POL. 339, 398 (2008) (quoting Editorial, *Silent, Silly, Offensive*, N.Y. TIMES, Jan. 11, 1917, at 4) (other citations omitted).

31. SUSAN WARE, *WHY THEY MARCHED: UNTOLD STORIES OF THE WOMEN WHO FOUGHT FOR THE RIGHT TO VOTE* 242 (2019).

32. STEVENS, *supra* note 24, at 59–66.

33. *Id.* at 61 (“Perhaps he thought it a trifling incident staged by a minority of the radical suffragists and anticipated no popular support for it. When he saw their persistence through a cruel winter his sympathy was touched. He ordered the guards to invite them for a cup of hot coffee, which they declined. He raised his hat to them as he drove through the line. Sometimes he smiled. As yet he was not irritated. He was confident in his national power.”).

34. *Id.* at 67.

35. Dodd, *supra* note 30, at 398 (quoting CHRISTINE A. LUNARDINI, *FROM EQUAL SUFFRAGE TO EQUAL RIGHTS: ALICE PAUL AND THE NATIONAL WOMAN’S PARTY, 1910–1928*, at 111–12 (1991)).

36. Dodd, *supra* note 30, at 401 n. 264.

37. *Id.* at 400.

this end, the suffragists created banners meant to embarrass the Wilson administration whenever it hosted a foreign envoy at the White House.³⁸ This embarrassment reached a tipping point in June 1917, when a Russian envoy visited the White House.³⁹ Seeking to harken on the sentiments of the Russian Revolution,⁴⁰ the suffragists arrived at the White House on June 20, 1917 with a banner stating:

To the Russian Envoys, we the women of America tell you that America is not a democracy. Twenty million American women are denied the right to vote. President Wilson is the chief opponent of their national enfranchisement. Help us make this nation really free. Tell our government it must liberate its people before it can claim free Russia as an ally.⁴¹

An angry passerby tore down this banner, and the next day a group of boys destroyed a second, similar banner.⁴² On each occasion, police looked on without interference.⁴³ The peaceful nature of the White House protest thereafter changed, and “the local police, apparently with the tacit support of the Wilson administration, started arresting and jailing picketers for disorderly conduct and obstructing sidewalk traffic, even though they were doing nothing differently than they had for the past six months.”⁴⁴

Local police made the first arrests on June 22, 1917, arresting Lucy Burns and Katherine Morey.⁴⁵ The next day brought more arrests, but officials in the District of Columbia dismissed each of the cases arising from these initial arrests, and the women were never tried.⁴⁶ On June 26, 1917, however, local officials arrested six women for “obstructing the traffic,” tried them, and sentenced them to a 25 dollar fine.⁴⁷ After the women refused to pay the fine, the court sentenced them to three days in jail.⁴⁸ Several arrests followed a similar pattern, and “by October 1917, seventy women were arrested, six of them for terms as long as six

38. *Id.* (“In one of Wilson’s speeches, often quoted on suffrage banners, Wilson declared: ‘We shall fight for the things which we have always held nearest our hearts—for democracy, for the right of those who submit to authority to have a voice in their own governments.’”); *see also* STEVENS, *supra* note 24, at 74.

39. *Id.* at 73.

40. WARE, *supra* note 31, at 244.

41. STEVENS, *supra* note 24, at 74.

42. *Id.*; WARE, *supra* note 31, at 244.

43. STEVENS, *supra* note 24, at 74.

44. WARE, *supra* note 31, at 244.

45. STEVENS, *supra* note 24, at 76; Dodd, *supra* note 30, at 404.

46. STEVENS, *supra* note 24, at 76.

47. *Id.*

48. Dodd, *supra* note 30, at 404.

months.”⁴⁹ The District of Columbia sent the women to the Occoquan Workhouse in Virginia and the District Jail to serve their sentences. Once incarcerated, the women courageously continued their protests from behind prison walls, calling attention not just to the unjust nature of their imprisonment, but also the squalid and miserable conditions of the prisons.

A. *The Occoquan Workhouse in Virginia and the District Jail*

Workhouses arose as a place of punishment in Europe in the late sixteenth century.⁵⁰ The workhouse regime revolved around forced labor, wherein prisoners worked ten-to-twelve hour days (with Sundays reserved for religious worship) and produced a certain fixed output of product.⁵¹ By the Victorian era in England, workhouses had transformed into places for the destitute rather than for felons.⁵² These workhouses were institutions of “strict control” and imposed a “harsh disciplinary regime,”⁵³ with conditions meant to deter inhabitants from returning (e.g., unpalatable food provided in only minimal amounts, hard labor, shameful uniforms, and boards rather than beds for sleep).⁵⁴

Built in 1910, the Occoquan Workhouse reflected a more rehabilitative, rather than deterrent, ideal than its European counterparts.⁵⁵ In contrast to their counterparts confined in the penitentiary, prisoners in the workhouse worked in trades meant to further their reform.⁵⁶ The Women’s Workhouse at Occoquan opened in 1912; it confined “poor women of color, imprisoned for crimes such as disorderly conduct and

49. WARE, *supra* note 31, at 245. There are conflicting accounts as to how many women were arrested as a result of the picketing movement. See, e.g., JOHANNA NEUMAN, *GILDED SUFFRAGISTS: THE NEW YORK SOCIALITES WHO FOUGHT FOR WOMEN’S RIGHT TO VOTE* 129 (2017) (“By the time all were released in November, by one estimate 2,000 American women had joined the protest line, 500 had been arrested, and 170 have been jailed for demanding the right to vote.”).

50. Pieter Spierenburg, *The Body and the State: Early Modern Europe*, in *THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY* 45, 61 (Norval Morris & David J. Rothman eds., 1995).

51. *Id.* at 64.

52. Seán McConville, *The Victoria Prison: England, 1865–1965*, in *THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY* 117 (Norval Morris & David J. Rothman eds., 1995).

53. Patricia O’Brien, *The Prison on the Continent, Europe, 1865–1965*, in *THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY* 178, 182 (Norval Morris & David J. Rothman, eds., 1995).

54. McConville, *supra* note 52, at 28.

55. Wilson Korges, *The Lasting Legacy of Suffragists at the Lorton Women’s Workhouse*, *FOLKLIFE* (Mar. 21, 2018), <https://folklife.si.edu/magazine/lasting-legacy-of-suffragists-at-lorton-occoquan-womens-workhouse> [<https://perma.cc/2RYX-LY8X>].

56. *Id.*

prostitution. The women of the workhouse did laundry for the facility, while others worked in the gardens.”⁵⁷

In contrast to its rehabilitative ideal, the actual conditions of the Occoquan Workhouse likened to the conditions of the Victorian-era workhouses in England: the women confined there “were subjected to inedible food, humiliating treatment, lack of communication with the outside world, and—especially on the infamous ‘Night of Terror’ on November 15, 1917—physical intimidation and violence from prison authorities.”⁵⁸ Prison officials withheld the prisoners’ mail from them, fed them food with worms in it, and gave them blankets that had not been washed or cleaned for a year.⁵⁹

The Occoquan prison officials also subjected the women confined there to ruthless forms of punishment.⁶⁰ The prison superintendent and his son beat the women, and prison officials punished certain prisoners by limiting their food to only bread and water.⁶¹ Prison officials exploited pre-existing racial tensions by forcing women of one race to brutally attack women of another race, threatening punishment to those who refused.⁶² Women who disobeyed prison rules often were subjected to a form of punishment known as “the greasy pole.”⁶³

This method of punishment consisted of strapping girls with their hands tied behind them to a greasy pole from which they were partly suspended. Unable to keep themselves in an upright position, because of the grease on the pole, they slipped almost to the floor, with their arms all but severed from the arm sockets, suffering intense pain for long periods of time.⁶⁴

The conditions at the District Jail where some prisoners would spend some or all of their sentences were not much better than those at Occoquan. While the workhouse—aside from the solitary confinement cells—consisted mostly of open barracks, the District Jail, built in the 1870s, held conventional cells that measured six-by-nine feet, such that the women could touch each side with their fingertips with their arms outstretched.⁶⁵ Frequently, the jail officials confined the women two to a

57. *Id.*

58. WARE, *supra* note 31, at 246. The “Night of Terror” is described in more detail below. *See infra* at I.B.

59. STEVENS, *supra* note 24, at 96.

60. *Id.*

61. *Id.*

62. *Id.* at 99.

63. *Id.*

64. *Id.*

65. J.D. ZHANISER & AMELIA R. FRY, ALICE PAUL: CLAIMING POWER 282 (2014).

cell, and prison officials responded to the slightest disobedience by placing the women in solitary confinement.⁶⁶ The tiny cells were infested with vermin, including rats and bed bugs, and each cell contained an open toilet, which, when combined with the prison's practice of closing the workhouse windows from late afternoon until morning, created a stifling environment.⁶⁷

Despite these conditions and the risk of further torturous punishments, the conviction of the Silent Sentinels did not waiver, and they continued their protests from within prison walls.

B. The Silent Sentinels' In-Prison Protests

The very fact of the first sentences to Occoquan caused quite a stir, and one should not underestimate how the imprisonment of sixteen "leading suffragists and very well-connected women" helped garner immediate public support for the women and their cause.⁶⁸ There can be no doubt that the arrests' efficacy in furthering the suffrage movement is tied to the wealth and elite status of the women suddenly labelled prisoners.⁶⁹ Indeed, the wealth and status of the prisoners' husbands certainly furthered the outrage that followed the initial arrests, and President Wilson's quick pardon of the first group of women sentenced was in part driven by racist news coverage heralding the women's courage in coping with Occoquan's integrated environment.⁷⁰

But, no matter their social status and background, the introduction to Occoquan's conditions did little to stem the conviction of the picketers, and by August 17, 1917, more picketers were arrested and sentenced to Occoquan.⁷¹ No pardon followed these arrests or the others that ensued in the forthcoming weeks.⁷² Garnering no special treatment at the prison, the suffragist prisoners lived in and with conditions of "poor sanitation, infested food, and dreadful facilities:"⁷³

At first, the suffragist prisoners abide[d] by the routine of the institution,

66. *Id.* at 282–83.

67. *Id.*

68. Dodd, *supra* note 30, at 405.

69. *Id.* ("One was a daughter of a former ambassador and secretary of state. Another was the wife of a Progressive Party leader. Others were noted society figures, relatives of politicians, and high-ranking members of the NWP.").

70. *Id.* at 407 n.299.

71. *Id.* at 408.

72. *Id.*

73. *Id.* at 411.

disagreeable and unreasonable as it was. They performed the tasks assigned to them. They ate the prison food without protest. They wore the coarse prison clothes. But at the end of the first week of detention they became so weak from the shockingly bad food that they began to wonder if they could endure a diet of sour bread, half-cooked vegetables, and rancid soup with worms in it.⁷⁴

As it became clear that the arrested suffragists would face longer and longer terms of imprisonment, the women moved the protest inside the prison walls.

Claiming to be political prisoners, the women sought to intensify the pressure the picketing placed on the Wilson Administration by highlighting the injustice of their plight.⁷⁵ Lucy Burns began “quietly organizing within Occoquan for several weeks to circulate a petition among the imprisoned suffragists.”⁷⁶ Learning of her activities, the Occoquan officials placed Miss Burns in solitary confinement.⁷⁷ But her fellow suffragist prisoners carried on, completing the petition as their first in-prison protest action; the petition announced a prison work strike and requested that prison officials treat the women as political prisoners, making it “the first organized group action ever made in America to establish the status of political prisoners.”⁷⁸

In addition to the strike announcement and the request to be treated as political prisoners, the petition listed several other demands: (1) that the suffragists be allowed to congregate together and that Lucy Burns be released from solitary confinement; (2) that the suffragists be afforded the opportunity to meet with their lawyers; (3) that the suffragists be allowed to receive food from the outside; and (4) that the suffragists be provided writing materials and books, letters, and newspapers.⁷⁹ The petition also explained that the suffragists did not immediately create the petition “because on entering the workhouse [they] found conditions so very bad that before we could ask the suffragists be treated as political prisoners, it was necessary to make a stand for the ordinary rights of human beings for all the [prisoners].”⁸⁰ After garnering signatures, the suffragists smuggled the petition out to the district commissioners.⁸¹

74. STEVENS, *supra* note 24, at 95.

75. *Id.* at 105.

76. Dodd, *supra* note 30, at 411.

77. STEVENS, *supra* note 24, at 107.

78. *Id.*

79. *Id.* at 107–08.

80. *Id.* at 108.

81. Dodd, *supra* note 30, at 411.

In response, the commissioners quickly transferred Lucy Burns and the other signatories to the district jail, placing all of them in solitary confinement.⁸² The cells in which the women were confined had no fresh air—the windows were locked tight, and any woman who attempted to open one was physically thrown into a solitary cell.⁸³ The jail served food no better than the food provided at Occoquan, and the women existed on bread, water, and occasionally molasses.⁸⁴ On November 5, 1917, Alice Paul began a hunger strike to protest the women's treatment.⁸⁵ To Paul and those who joined her, the hunger strike was “the ultimate form of protest left.”⁸⁶ Rather than heed the demands of the suffragists, however, the jail administrators began force-feeding the hunger strikers.⁸⁷

In response to the force-feeding, suffragists on the outside increased the number of picketers at the White House, leading to their arrest and eventual sentence to Occoquan.⁸⁸ On November 11, 1917, “[f]orty-one woman suffragists from fifteen [s]tates were arrested . . . for picketing outside the White House.”⁸⁹ The women arrived at Occoquan on November 15, 1917, and their arrival ushered in what suffragists would later call the “Night of Terror” at the prison, “during which most suffered physical injuries as a result of the beatings and rough treatment by the Occoquan guards.”⁹⁰

From the moment the women arrived at Occoquan, the guards man-handled them, throwing them into dark, dirty cells with iron beds and open toilets that flushed only from outside the cell.⁹¹ The women were not provided food for nearly 24 hours.⁹² Neither the women's attorney nor their family members were allowed visitation with the incarcerated suffragists.⁹³ Many women began a hunger strike.⁹⁴ In an effort to break the will and morale of the hunger strikers, the Occoquan officials isolated them from one another, interrogated them, informed them that no one

82. STEVENS, *supra* note 24, at 108.

83. *Id.* at 113.

84. *Id.* at 114.

85. Dodd, *supra* note 30, at 411.

86. STEVENS, *supra* note 24, at 115.

87. *Id.* at 118–19.

88. Dodd, *supra* note 30, at 413.

89. SALLY ROESCH WAGNER, *THE WOMEN'S SUFFRAGE MOVEMENT* 461 (2019).

90. Dodd, *supra* note 30, at 413. *See also* WAGNER, *supra* note 89, at 339 (noting conditions of “forced stripping, physical violence, shackling with manacles to prison bars, and threatened use of straightjackets and gags.”) (citing *Accuse Jailors of Suffragists*, N.Y. TIMES, Nov. 17, 1917, at 1).

91. STEVENS, *supra* note 24, at 122–23.

92. *Id.* at 124.

93. *Id.*

94. *Id.* at 124–26.

from the outside was paying any attention to them, lied to them by stating their attorney was no longer fighting the case, and instructed them that each of their compatriots had given up the fight.⁹⁵ The women “suspected the lies and remained strong in their resistance.”⁹⁶

The women soon filed a writ of *habeas corpus*, arguing that their confinement to Occoquan was illegal because they were serving sentences imposed by the District of Columbia outside the confines of the district and the sentencing papers authorizing their imprisonment indicated they should be committed to the District Jail.⁹⁷ On November 23, 1917, Judge Edmund Waddill of the United States District Court for the Eastern District of Virginia held a hearing on the prisoners’ writ.⁹⁸ The women filed into the courtroom, “haggard, red-eyed, sick,” some too weak to walk to their seats, and some bearing “the marks of the attack on the ‘night of terror.’”⁹⁹ Judge Waddill “felt alarmed by the writ’s description of the women’s treatment, calling it ‘bloodcurdling’ if true.”¹⁰⁰ Ultimately, the judge found “that the suffragists had been illegally imprisoned at Occoquan (rather than the District Jail) and that they could be paroled on bail or finish their terms at the District Jail.”¹⁰¹ Twenty-two women chose to finish their sentences at the jail, and upon arrival, the women joined the collective hunger strike begun by the others already confined to the jail.¹⁰² Faced with thirty hunger-striking women, the jail decided to release all of the women on November 27 and 28, 1917.¹⁰³ Upon release, the women brought suit against the district commissioners, the warden of the District of Columbia jail, the superintendent of Occoquan, and a workhouse guard, requesting \$800,000 in damages for the brutality they suffered during their terms of imprisonment, particularly on the “night of terror.”¹⁰⁴

Thereafter, as Congressional movement began on the Nineteenth Amendment, the women paused their picketing protests for a time.¹⁰⁵ When it became clear that the Senate would stall the Amendment’s passage, the women once again gathered at Lafayette Monument, directly across from the White House, with their banners in tow.¹⁰⁶ District

95. *Id.* at 126.

96. *Id.*

97. *Id.* at 127, 130.

98. *Id.* at 128.

99. *Id.* at 129.

100. ZHANISER & FRY, *supra* note 65, at 294.

101. Dodd, *supra* note 30, at 415 n.346.

102. STEVENS, *supra* note 24, at 130.

103. *Id.* at 129.

104. *Id.* at 131.

105. *Id.* at 137–40.

106. *Id.* at 141.

officials arrested 48 women at the protest, charged them with and convicted them of “holding a meeting in public grounds” and “climbing on a statue,” and sentenced them to 10 (for holding a public meeting) or 15 (for climbing on a statue) days imprisonment.¹⁰⁷

To serve these sentences, district officials transported 26 women to an abandoned building that used to serve as a men’s workhouse until it “had been declared unfit for human habitation.”¹⁰⁸

This place was the worst the women had experienced. Hideous aspects which had not been encountered in the workhouse and jail were encountered here. The cells were damp and cold. The doors were partly of solid steel with only a small section grating, so that a very tiny amount of light penetrated the cells. The cots were of iron, without any spring and with only a thin straw pallet to lie upon. So frightful were the nauseating odors which permeated the place, and so terrible was the drinking water from the disused pipes, that one prisoner after another became violently ill.¹⁰⁹

All but two very elderly women declared a hunger strike upon arrival.¹¹⁰ Within five days, district officials released the women.¹¹¹

In the months that followed, the women’s protests continued, and the district police made periodic arrests.¹¹² With each arrest, conviction, and sentence, the women continued their practice of hunger striking in protest.¹¹³

C. Official Responses to the Suffragists’ Protests

Undoubtedly, the suffragists’ protest activities—both in and out of prison—helped advance the passage of the Nineteenth Amendment. The National Woman’s Party experienced a dramatic increase in donations after the 1918 arrests and consequent exposure to the conditions in the Occoquan workhouse and the District of Columbia jail. On September 14, 1917, a month after the second large set of suffragist prisoners arrived at Occoquan, Senator Andrieus A. Jones, the Chair of the Senate Committee on Woman Suffrage, visited Occoquan.¹¹⁴ The next day, the House of Representatives reported the Nineteenth Amendment out of committee,

107. *Id.* at 129.

108. *Id.*

109. *Id.* at 144.

110. *Id.*

111. *Id.*

112. *See, e.g., id.* at 162, 168, 172–73, 179.

113. *Id.* at 162.

114. Dodd, *supra* note 30, at 411.

and by September 24, 1917, the House “created a standing committee on suffrage.”¹¹⁵ By January 10, 1918, “exactly forty years to a day from the time the suffrage amendment was first introduced into Congress and exactly one year to a day from the time the first picket banner appeared at the gate of the White House,” the House of Representative passed the Amendment.¹¹⁶ While the fight to push the Amendment through the Senate lasted an additional year-and-a-half, officials never questioned the will of the suffragists to continue their protest strategy. By March 4, 1918, the D.C. Court of Appeals invalidated the picketers’ convictions.¹¹⁷

The consequences of the suffragists’ staunch resistance to their unjust convictions and confinement extended beyond just advancing their cause. By evading Occoquan’s censorship, and later the District Jail’s controls, the suffragists’ surreptitious messages about life in the workhouse garnered press coverage¹¹⁸ and eventually led to a Congressional investigation into the conditions at Occoquan.¹¹⁹ Even the Wilson White House requested an inquiry into Occoquan’s conditions “after receiving one too many protest letters about the imprisoned suffragists’ plight.”¹²⁰ While the President’s secretary and right-hand man confirmed the women’s poor treatment, the President rejected this opinion, instead tasking a district commissioner with the assignment of preparing an investigative report on prison conditions.¹²¹ The commissioner “did little more than interview the prison officials,” and the report ultimately kowtowed to political pressure, but the inquiry nonetheless brought a small amount of transparency to the prison that had theretofore been lacking.¹²²

115. *Id.*

116. STEVENS, *supra* note 24, at 137–40.

117. *Hunter v. Dist. of Columbia*, 47 App. D.C. 406, 410 (1918).

118. ZHANISER & FRY, *supra* note 65, at 370 (noting that a *New York Tribune* reporter called for an impartial investigation related to the treatment).

119. STEVENS, *supra* note 24, at 98.

120. ZHANISER & FRY, *supra* note 65, at 288.

121. *Id.*

122. Dodd, *supra* note 30, at 413–14; *see also* ZHANISER & FRY, *supra* note 65, at 288.

III. THE FIRST AMENDMENT AND PRISON¹²³

Ostensibly, there is no barrier separating prisoners from the protections afforded by the Constitution.¹²⁴ However, prisoners' First Amendment rights are limited while incarcerated because, once behind the prison walls, a prisoner holds only "those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penal objectives of the correctional system."¹²⁵ While the constitutional test that governs restrictions on prisoners' First Amendment rights (the *Turner* standard) is not meant to be toothless, "regulations founded on flimsy rationales get upheld frequently enough, and the reasoning is often poor enough" that scholars and litigants are left wondering whether the standard has any bite.¹²⁶ "[Prisoners] are denied reading material deemed objectionable by their captors, exposed to retaliation for expressing opinions at odds with those of their jailers, refused access to the news media, punished for possessing 'radical' views, and rewarded for renouncing them."¹²⁷ "Even a prisoner who has no desire to obtain, distribute, or even discuss anything objectionable faces grave impediments in pursuing his or her own intellectual star, however

123. In this section, I focus on how the Supreme Court has analyzed First Amendment claims brought under a free speech theory. In so doing, I purposefully limit my analysis of prisoner protest activities to activities undertaken by individuals, not as part of a larger, organized group. Prisoners' associational rights have been significantly curtailed by the Supreme Court's 1977 decision in *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977). In *Jones*, the Supreme Court upheld a North Carolina prison policy that prohibited prisoners from joining the North Carolina prisoners' union, holding union meetings, and restricted correspondence related to union activities. *Id.* at 122. The union sought to improve prison conditions and "to serve as a vehicle for the presentation and resolution of [prisoner] grievances." *Id.* The Court held that the prison policy was a legitimate restriction on prisoners' First Amendment right to association and chastised the lower court for failing to give appropriate deference to prison officials' beliefs about the dangers arising from the union's existence. *Id.* at 125–26, 130. This holding provided a preview for the built-in deference to prison officials that would later embody First Amendment jurisprudence regarding prisoners, as discussed below. There are many criticisms that can be made of the *Jones* case, but such criticisms are largely outside the purview of this piece. See, e.g., Andrea C. Armstrong, *Racial Origins of Doctrines Limiting Prisoner Protest Speech*, 60 HOW. L.J. 221, 248–60 (2016). In a forthcoming piece, I turn my focus to *Jones* to examine how the historical example of the Silent Sentinels' in-prison protests supports a reexamination of the deference afforded prison officials in relation to prisoners' associational and petition rights. See Nicole B. Godfrey, *'Inciting a Riot': Silent Sentinels, Group Protests, and Prisoners' Petition and Associational Rights*, 43 SEATTLE U. L. REV. __ (forthcoming Nov. 2020).

124. *Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989) (quoting *Turner v. Safley*, 482 U.S. 78, 84 (1987)) ("Prison walls do not form a barrier separating prison inmates from the protections of the Constitution.").

125. Armstrong, *supra* note 123, at 223 (quoting *Pell v. Procunier*, 417 U.S. 817, 822 (1974)).

126. Shapiro, *supra* note 23, at 988.

127. Ronald L. Kuby & William M. Kunstler, *Silencing the Oppressed: No Freedom of Speech for Those Behind the Walls*, 26 CREIGHTON L. REV. 1005, 1005 (1993).

innocuous. A plethora of prison regulations, designed to facilitate prison administration, impose formidable restrictions of a prisoner's access to ideas and information."¹²⁸

The Supreme Court announced the standard governing a prisoner's First Amendment free speech claim in the 1987 Supreme Court decision *Turner v. Safley*.¹²⁹ In this section, I explain and examine the *Turner* standard before turning to the well-documented criticisms of *Turner*'s application in the three-plus decades since the decision. After gaining an understanding of the First Amendment's application in prison, we'll turn back to the example of the Silent Sentinels to add to the chorus of criticisms against *Turner*, focusing particularly on the importance of protecting prisoner protest and curbing some of the deference afforded prison officials under the *Turner* test.

A. *Turner v. Safley and Deference to Prison Officials*

For more than a century after the adoption of the Bill of Rights, federal courts refused to entertain claims challenging prison conditions.¹³⁰ Unwilling to disturb internal prison management, the federal courts took a "hands-off" approach to the nation's prisons and jails.¹³¹ With the dawn of the civil rights movement and its concerted efforts on effectuating change through the judicial system, the federal courts began recognizing federal remedies for constitutional violations challenged under 42 U.S.C. § 1983.¹³² With this recognition, federal courts also began allowing prisoners to sue prison officials for unconstitutional prison conditions.¹³³

While the prison walls do not separate prisoners from constitutional protections, the Supreme Court has always reminded prisoners that they retain limited constitutional rights once they enter the prison gates.¹³⁴ Nevertheless, for many years, the federal courts subjected certain First Amendment violations by prison officials (e.g., those related to

128. *Id.* at 1018–19.

129. *Turner v. Safley*, 482 U.S. 78, 89 (1987).

130. Nicole B. Godfrey, *Institutional Indifference*, 98 OR. L. REV. 151, 165 (2019).

131. *Id.* (citing Edgardo Rotman, *The Failure of Reform: United States, 1865–1965*, in *THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY* (Norval Morris & David J. Rothman eds., 1995)).

132. *Id.* See also Nicole B. Godfrey, *Holding Federal Prison Officials Accountable: The Case for Recognizing a Damages Remedy for Federal Prisoners' Free Exercise Claims*, 96 NEB. L. REV. 924, 931–32 (2018).

133. See, e.g., *Cooper v. Pate*, 378 U.S. 546, 546 (1964) (allowing a Muslim prisoner to challenge prison policies restricting his access to religious leaders of his faith).

134. *Pell v. Procunier*, 417 U.S. 817, 822 (1974).

restrictions on correspondence) to a more exacting standard of review.¹³⁵ But, as the prison population exploded in the late 1970s and early 1980s, the federal courts began seeing an increasing number of lawsuits challenging prison conditions.¹³⁶ This increase in prisoner suits—even unsuccessful cases—caused prison officials to focus on how “to avoid judicial intrusions into their domain.”¹³⁷

In *Turner*, prison officials successfully argued that prison officials should be afforded substantial deference by the federal courts when considering whether prison policies violate prisoners’ constitutional rights.¹³⁸ *Turner* involved Leonard Safley’s challenge to two prison regulations promulgated by the Missouri Department of Corrections.¹³⁹ In the early 1980s, Mr. Safley lived in the Renz Correctional Institution in Cedar City, Missouri, a prison that confined both male and female prisoners.¹⁴⁰ Mr. Safley fell in love with a female prisoner named P. J. Watson, and the two developed a romantic relationship.¹⁴¹ When the prison officials at Renz learned about the relationship, they transferred Mr. Safley to another prison pursuant to policy.¹⁴² After his transfer, Mr. Safley attempted to send letters to Ms. Watson, who remained at Renz, and the two requested to marry one another.¹⁴³ The superintendent at Renz, however, instituted policies that (1) prohibited correspondence between prisoners at other institutions unless the prisoners were related or involved in the same legal matter and (2) discouraged marriages between two prisoners.¹⁴⁴ Mr. Safley sued Bill Turner, Renz’s superintendent, and

135. See, e.g., *Procunier v. Martinez*, 416 U.S. 396, 412–13 (1974) (requiring that the regulation or practice “further a substantial governmental interest unrelated to the suppression of expression” and “the limitation of First Amendment freedoms . . . be no greater than necessary or essential to the protection of the particular governmental interest involved.”).

136. Cf. William Bennett Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610, 626–27 (1979) (noting the increase in prison population but concluding that prison population is “by no means determinative” of the volume of prisoner lawsuits).

137. *Id.* at 639.

138. Brief for Petitioners, *Turner v. Safley*, 482 U.S. 78 (1987) (No. 85-1384), 1988 WL 1026291, at *30 (arguing that the district court’s use of the least restrictive alternatives test failed to “give the appropriate deference to the decisions made by the correctional officers in light of their legitimate security and rehabilitation concerns.”).

139. David L. Hudson, Jr., *Turner v. Safley: High Drama, Enduring Precedent*, FREEDOM F. INST. (May 1, 2008), <https://www.freedomforuminstitute.org/2008/05/01/turner-v-safley-high-drama-enduring-precedent/> [https://perma.cc/562L-W8EA].

140. *Id.* at 139.

141. *Id.*

142. *Id.* (“Prison policy provided that when a male and female [prisoner] entered into a close or physical relationship one of the two [prisoners] would be transferred.”).

143. *Id.*

144. *Id.*

other prison officials, claiming that the correspondence and marriage policies violated his First Amendment rights.¹⁴⁵

After Mr. Safley filed suit, a lawyer entered the case on his behalf, and amended the complaint to seek class certification on behalf of Mr. Safley and similarly situated prisoners.¹⁴⁶ The district court, after an evidentiary hearing, entered detailed findings of fact and conclusions of law invalidating both policies as infringing the constitutional rights of the prisoner class.¹⁴⁷ The Eighth Circuit affirmed, concluding that correspondence between prisoners “is not presumptively dangerous nor inherently inconsistent with legitimate penological objectives” and that the marriage rule as applied by Superintendent Turner was unconstitutional on its face because it provided no alternative means of exercising the right to marry.¹⁴⁸ The Supreme Court affirmed in part and reversed in part and, in so doing, announced a new test through which federal courts should examine First Amendment claims brought by prisoners.¹⁴⁹

The new test announced by the *Turner* Court includes four factors.¹⁵⁰ The first factor, which Professor David Shapiro aptly dubbed the “heart” of the *Turner* standard,¹⁵¹ requires the court to examine whether there is a “‘valid, rational connection’ between the prison regulation and the legitimate government interest put forward to justify it.”¹⁵² Oftentimes, this factor alone is dispositive in *Turner* cases—if the prison system can come forward with any legitimate government interest to justify the regulation, even if that interest is not the actual reason the prison system enacted the policy, the prisoner loses.¹⁵³ The second factor requires a federal court to examine whether there are alternative means for the prisoner to exercise the right at issue, and the third factor compels the court to assess how accommodating the right at issue might impact prison

145. *Id.*

146. *Id.*

147. *Safley v. Turner*, 586 F. Supp. 589, 590–96 (W.D. Mo. 1984).

148. *Safley v. Turner*, 777 F.2d 1307, 1313–14 (8th Cir. 1985).

149. *Turner v. Safley*, 482 U.S. 78, 89–91, 93, 99 (1987).

150. *Id.* at 89–91.

151. Shapiro, *supra* note 23, at 982.

152. *Turner*, 482 U.S. at 89 (quoting *Block v. Rutherford*, 468 U.S. 576, 586 (1984)).

153. *See, e.g., Beard v. Banks*, 548 U.S. 521, 532–33 (2006) (acknowledging that the Court was not balancing the *Turner* factors in this particular instance, but instead focusing on whether the prison officials “show[] more than simply a logical relation, that is, whether [they] show a *reasonable* relation.”). Nonetheless, “[w]hile the first factor is widely recognized as the most important,” some appellate courts have criticized lower courts for not considering all four factors at summary judgment. *Aref v. Lynch*, 833 F.3d 242, 259 n.12 (D.C. Cir. 2016) (citing *Lindell v. Frank*, 377 F.3d 655, 657 (7th Cir. 2004) and *Jacklovich v. Simmons*, 392 F.3d 420, 427 (10th Cir. 2004)).

guards, other prisoners, and the general allocation of prison resources.¹⁵⁴ Finally, the final factor forces the court to look at whether “obvious, easy alternatives” exist that allow for the exercise of the right at issue while still protecting the governmental interest asserted.¹⁵⁵

In articulating this test, the *Turner* Court emphasized that the test was driven by a perceived need to grant deference to prison officials:

Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint. Where a state penal system is involved, federal courts have . . . additional reason to accord deference to the appropriate prison authorities.¹⁵⁶

After *Turner*, the Supreme Court has never found a prison policy to violate a prisoner’s First Amendment rights, and any prisoner seeking to challenge a prison regulation on First Amendment grounds certainly faces an uphill battle.¹⁵⁷ Despite the lack of successful challenges to prison policies under the First Amendment, the Supreme Court has long maintained that *Turner*’s “reasonableness standard is not toothless.”¹⁵⁸ It may be that the Court does not mean *Turner* to be toothless, but as many commentators have recognized, “decisions by the lower federal courts sometimes render it so.”¹⁵⁹

154. *Turner*, 482 U.S. at 90.

155. *Id.* at 90–91.

156. *Id.* at 84–85.

157. See, e.g., *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 347, 349–50 (1987) (upholding New Jersey prison policy forbidding prisoners with outside work assignments from returning to prison for Jumu’ah services on Fridays); *Thornburgh v. Abbott*, 490 U.S. 401, 403–04 (upholding Federal Bureau of Prisons’ policy that allowed the warden to refuse to deliver a publication received in the mail to a prisoner if the warden determined the publication was “detrimental to the security, good order, or discipline of the institution, or if it might facilitate criminal activity.”); *Overton v. Bazzetta*, 539 U.S. 126, 128–131, 133–34, 137 (2003) (upholding Michigan prison policies that banned contact visits for prisoners considered the most dangerous, banned visits from children who were not immediate family members, and banned all visitors except for attorneys and clergy for prisoners with multiple substance abuse violations); *Beard v. Banks*, 548 U.S. 521, 525–26, 530–32 (upholding Pennsylvania policy that prohibited phone calls (except in emergencies), visits (except one each month), and newspapers and magazines for prisoners confined to the Long Term Segregation Unit, meant to hold approximately forty prisoners deemed the “most incorrigible, recalcitrant” prisoners in the state).

158. *Johnson v. California*, 543 U.S. 499, 524, 547 (2005) (Thomas, J., dissenting) (quoting *Thornburgh*, 490 U.S. at 414).

159. Shapiro, *supra* note 23, at 988.

B. Criticisms of *Turner's Deference*

Since the Supreme Court announced its decision in *Turner*, the decision has been appropriately criticized in student notes and comments¹⁶⁰ and by legal scholars.¹⁶¹ The central theme found in almost all criticisms levied against the *Turner* standard is that the deference afforded prison officials goes too far.

Professor Erwin Chemerinsky turns the Court's assumption that it must defer to prison officials on its head, arguing that authoritarian institutions like prisons "are the places where aggressive judicial review is most essential."¹⁶² Chemerinsky provides two interrelated reasons for this argument: (1) prisons and other authoritarian institutions are, by their

160. See, e.g., Owen Rarric, Kirsh v. Wisconsin Department of Corrections: *Will the Supreme Court Say "Hands Off" Again?*, 35 AKRON L. REV. 305, 319 (2002) (arguing that *Turner* deference "results in a manipulated application" of the standard "because it allows courts to find a 'reasonable security concern' based upon mere speculation.") (quoting Roth, *infra* note 160, at 686); Cheryl Dunn Giles, *Turner v. Safley and its Progeny: A Gradual Retreat to the "Hands-off" Doctrine*, 35 ARIZ. L. REV. 219, 236 (1993) (criticizing *Turner* for failing to give sufficient weight to clearly identified alternatives to the regulation at issue); William Mark Roth, *Turner v. Safley: The Supreme Court Further Confuses Prisoners' Constitutional Rights*, 22 LOY. L.A. L. REV. 667, 714 (1989) (criticizing *Turner's* deference for allowing "evidence based on mere speculation"); Lorie Jean Golichowski Dei, *The New Standard of Review for Prisoners' Rights: A "Turner" for the Worse?*, 33 VILL. L. REV. 393, 436 (1988) (arguing that *Turner's* focus on deference robs the standard "of most of its bite."); Matthew P. Blishcak, *O'Lone v. Estate of Shabazz: The State of Prisoners' Religious Free Exercise Rights*, 37 AM. U. L. REV. 453, 486 (1988) (criticizing the Court's extension of *Turner* to free exercise claims, thereby creating a constitutional standard for those claims "that relies heavily on the discretion of prison administrators.").

161. See, e.g., Evan Bianchi & David Shapiro, *Locked Up, Shut Up: Why Speech in Prison Matters*, 92 ST. JOHN'S L. REV. 1, 28 (2018) (arguing that the costs of deference are severe because unfettered deference takes prisoner speech out of the discourse of American ideas, a result contrary to the values inherent to the First Amendment); Shapiro, *supra* note 23, at 988–1005 (arguing that the need for deference is overstated and a higher standard of review could still adequately protect the interests of prison officials); Clay Calvert & Kara Carnley Murrhee, *Big Censorship in the Big House—A Quarter-Century After Turner v. Safley: Muting Movies, Music & Books Behind Bars*, 7 NW. J.L. & SOC. POL'Y 257, 269 (2012) (arguing that "fears of violence and disruption of security within prisons largely fuel the deference granted prison officials when it comes to protecting the First Amendment free speech rights of prisoners."); Scott A. Moss, *Students and Workers and Prisoners—Oh, My! A Cautionary Note About Excessive Institutional Tailoring of First Amendment Doctrine*, 54 UCLA L. REV. 1635, 1666–68 (2007) (arguing that the premise that courts should defer to the professional judgment of prison officials "proves too much" and is "inconsistent with the heightened scrutiny typically applicable to government restrictions on individual rights."); Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 SUFFOLK U. L. REV. 441, 458 (1999); Kuby & Kunstler, *supra* note 127, at 1010 (arguing the idea that prison officials should be afforded deference on questions of free speech in prison is the equivalent of allowing the governor to silence the governed); Alphonse A. Gerhardstein, *False Teeth? Thornburg's Claim That Turner's Standard for Determining a Prisoner's First Amendment Rights Is Not "Toothless"*, 17 N. KY. L. REV. 527, 543 (1990) (arguing that as applied challenges to prison regulations should be accorded less deference than facial challenges).

162. Chemerinsky, *supra* note 161, at 458.

very nature, the “places where serious abuses of power and violations of rights are likely to occur;”¹⁶³ and (2) prisoners, who are “routinely and permanently disenfranchised,” lack the political power to effectuate change to their circumstances through other democratic means.¹⁶⁴ Moreover, Professor Chemerinsky argues that deference to prisons is not absolutely necessary.¹⁶⁵

Radical lawyers Ronald Kuby and William Kunstler similarly take issue with the idea that authoritarian institutions should be able to police speech levied against them.¹⁶⁶ To Kuby and Kunstler:

The notion that the judgments of prison administrators are entitled to wide-ranging deference is a concept utterly alien and antithetical to the rest of First Amendment jurisprudence. Prison administrators are the persons who are least likely to be trusted with the power to censor [prisoners]. It is they who feel the lash of prisoners’ freedom of speech most keenly; it is they who are called to task when corruption and brutality are exposed. The idea that governors, by virtue of their role as governors, should have the power to silence the governed is absurd in any other context but penal institutions.¹⁶⁷

They point out that “[p]rison administrators differ widely in background, education, skills, and social attitudes,” and, therefore, prison officials do not have “some mysterious expertise that requires deference from the federal courts.”¹⁶⁸

Professor Scott Moss agrees. He argues that deference to prisons (like deference to public schools and employers’ decisions in employment discrimination cases) fails to account for the expertise judges have in the criminal justice system, the limited scope of judicial review in any case, and the incentives for parties to fully develop their litigation position to ensure a full and fair adjudication of the merits of constitutional claims.¹⁶⁹

In furtherance of Moss’ idea that federal courts should value a full and fair adjudication of the merits of constitutional claims, Professor David Shapiro argues that it is time for the Supreme Court to revisit *Turner* in light of the lessons learned by its application over the past 30-plus years.¹⁷⁰ In particular, Shapiro argues that the Supreme Court should

163. *Id.*

164. *Id.* at 458–60.

165. *Id.* at 460–61.

166. Kuby & Kunstler, *supra* note 127, at 1024.

167. *Id.*

168. *Id.* at 1023.

169. Moss, *supra* note 161, at 1666–67.

170. Shapiro, *supra* note 23, at 1026.

remodel judicial review of prisoner speech claims in light of the substantial success achieved by the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act “in expanding protection of prisoners’ expression without compromising institutional safety.”¹⁷¹ Indeed, Shapiro points to the spotty record of the lower federal courts in *Turner* cases and calls on the Supreme Court to make clear “that deference does not mean the abandonment of review.”¹⁷²

Such a call is supported by the research of Professor Clay Calvert and Kara Carnley Murrhee, who analyzed eight federal court decisions issued between 2010 and 2011 that impacted prisoners’ access to media.¹⁷³ From this exhaustive analysis, Calvert and Murrhee conclude that *Turner*’s deference is often fueled and expanded by judicial fear, not by rigorous application of the standard to actual proof of harm caused by the speech at issue.¹⁷⁴ Calvert and Murrhee take particular issue with the burden-shifting result of *Turner*:

Furthermore, under the *Turner* framework, judicial “deference not only lightens the government’s burden of justifying a speech restriction, *but actually shifts the burden back to the speech plaintiff*. On the question of proof of harm allegedly caused by speech, this burden shifting has the rather perverse result of requiring [a prisoner] to demonstrate lack of causation while assuming that the speech prison officials seek to censor causes harm. Put more bluntly, the burden on the plaintiff-[prisoner] is to prove a negative. How a plaintiff behind bars might accomplish this task boggles the mind, even if he or she was a social scientist capable of designing and performing experiments behind bars.”¹⁷⁵

According to Calvert and Murrhee, then, the standard *has* been rendered “toothless,” and “unless a [prisoner’s] case involves particularly outrageous facts or happens to be assigned to a pro-free speech jurist who refuses to grant expansive deference to prison officials, there is very little hope of a First Amendment triumph under *Turner* today.”¹⁷⁶

This lack of judicial oversight of prisoner speech undercuts the values upon which First Amendment jurisprudence has developed.¹⁷⁷ Thus, “the costs of deference are quite severe.”¹⁷⁸ By failing to protect

171. *Id.* at 1027.

172. *Id.* at 1026.

173. Calvert & Murrhee, *supra* note 161, at 269–93.

174. *Id.* at 295.

175. *Id.* at 294; *see* Moss, *supra* note 161, at 1659 (emphasis added).

176. Calvert & Murrhee, *supra* note 161, at 296.

177. Bianchi & Shapiro, *supra* note 161, at 28.

178. *Id.*

prisoners' free speech rights, the federal courts enable prison systems to undercut core First Amendment values and to curtail democratic participation by the more than 2.2 million people incarcerated today.¹⁷⁹ The next section turns back to the example of the Silent Sentinels to examine how the Silent Sentinels' in-prison protest furthered the values underlying the First Amendment and why the federal courts should re-examine *Turner* to ensure prisoners' are afforded adequate protections for protest speech.

IV. IMPORTANCE OF PROTECTING PRISONER PROTEST

As discussed in the introduction to this piece, the American prison has become known as a place of unspeakable violence and inhumanity, wherein prisoners are:

placed in cells with human waste and subjected to the screams of psychiatric patients; [] forced to sleep for two months, despite repeated complaints, on a concrete floor in a cramped cell with a mentally ill HIV-prisoner who urinates on [them]; [subjected to treatment like] urine thrown at [them] by a guard which splashed on [their] face and shirt.¹⁸⁰

Despite these horrors occurring daily in the nation's prisons and jails, federal courts often largely defer to prison administrators in claims alleging constitutional violations, thereby allowing rights' violations to go unchecked for decades. I submit that by strengthening the protections afforded to prisoner speech, and particularly prisoner protest speech, we can further the values enshrined in the First Amendment and allow prisoners to join the current conversation about criminal justice reform—reform that impacts their lives much more than the politicians and pundits currently pushing or opposing such reform.

In this section, I use the example of the in-prison protests staged by the Silent Sentinels to examine how those protests furthered three interrelated First Amendment values. But before moving further into a discussion of how the experience of the Silent Sentinels' in-prison protest provide a compelling example as to why prisoner protest should be afforded greater protections than current First Amendment jurisprudence allows, I must pause to comment on the limitations of this example. First, the women arrested and jailed in connection with the picketing campaign

179. *Id.*

180. Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. PA. J. CONST. L. 115, 134 (2008) (citing *Harper v. Showers*, 174 F.3d 716, 717–20 (5th Cir. 1999); *Watts v. Gatson*, No. 97-0114-CB-M, 1999 U.S. Dist. LEXIS 6593, at *6 (S.D. Ala. Apr. 1, 1999); *Fackler v. Dillard*, No. 06-10466, 2006 WL 2404498, at *1 (E.D. Mich. July 7, 2006)).

were white, wealthy, educated, and often married to men who were politically and socially well-connected. Thus, the lived reality of these women is starkly different than the lived reality of most of today's prisoners, who are largely non-white, poor, uneducated, and without political or social connections. Therefore, the suffragist prisoners' voices garnered more empathy and credibility than most prisoners' voices garner today. Second, part of the outpouring of sympathy that accompanied the initial arrests was grounded in the undoubtedly racist views that the suffragist prisoners should not be forced to live in Occoquan's segregated environment.¹⁸¹ Finally, the suffragist prisoners were jailed on what most people likely viewed as bogus charges, while many (but certainly not all, or even most) prisoners incarcerated today are serving time on more serious charges. While each of these limitations highlights the stark differences between the suffragist prisoners and the men and women incarcerated in our nation's prisons and jails today, I submit the example still provides utility in examining how First Amendment values are honored by affording protection for prisoners' individual protest speech in the ways outlined below.

The First Amendment values I focus on in the remainder of this section are: (1) the value of promoting democracy by checking the power of the captors; (2) the value of expanding the marketplace of ideas by highlighting the importance of democratic participation and fighting for their voices to be heard both inside and outside the prison walls to promote transparency of opaque institutions; and (3) the value of promoting individual identity and autonomy by not allowing their status as prisoners to distract them from their fundamental purpose: to secure the vote for all women. From there, I turn to examples of modern prisoner protests, highlighting both the risks inherent to engaging in such protest for the prisoners involved and the rewards earned by those protests that garner sufficient public attention to change the conditions inside the nation's prisons.

A. *First Amendment Values and the Silent Sentinels' In-Prison Protest*

"The fundamental purpose of the first amendment was to guarantee the maintenance of an effective system of free expression"¹⁸² for every person. While scholars have grappled with why the freedoms enshrined in the First Amendment merit special protection throughout the life of the

181. See, e.g., Dodd, *supra* note 30, at 407, n.299.

182. Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878 (1963).

republic, it seems clear that any justification for these particularized constitutional protections is grounded in a view that values individual participation in democratic governance.¹⁸³ Professor Marc O. DeGirolami has distilled the justifications for the protections afforded in the First Amendment into three overlapping purposes. First, the First Amendment is meant to promote democratic values by holding government power in check.¹⁸⁴ Second, allowing for contributions from all voices expands the marketplace of ideas to further a societal quest for the truth.¹⁸⁵ Finally, the protections afforded by the First Amendment allow for the promotion of individual identity and autonomy.¹⁸⁶

1. Checking Power and Promoting Democratic Values

The first value highlighted by DeGirolami recognizes the importance of “free discourse” to a healthy, limited, liberal democratic government.¹⁸⁷ Under this justification, First Amendment freedoms are necessary to hold the government to account for abusive conduct and to limit the government’s imposition of a certain morality on the polity:¹⁸⁸

Free speech rights are also cherished as a vaccination against tyranny and abuse of government power. Underlying this ‘checking value’ is the well-founded suspicion that every government has a natural tendency to suppress the unpopular and maintain the status quo. Within a prison, the hand of the government is far heavier and more frequently involved in one’s daily affairs than outside the walls. The potential for abuse when one has complete control over other people needs little explanation.¹⁸⁹

Because prison provides an environment ripe for unchecked abuse, extending greater protection to prisoner speech necessarily furthers this First Amendment purpose.

From the start, the suffragists clearly recognized the potential their protests had to promote democratic values. “The rhetorical framing during the picketing campaign . . . centered on very abstract but emotionally

183. Marc O. DeGirolami, *Virtue, Freedom, and the First Amendment*, 91 NOTRE DAME L. REV. 1465, 1470 (2016).

184. *Id.*

185. *Id.* at 1470–71.

186. *Id.* at 1472.

187. *Id.* (quoting KENT GREENWALT, *FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH* 6 (1995)).

188. DeGirolami, *supra* note 183, at 1470–71 (citing, *inter alia*, Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. B. FOUND. RES. J. 521 (1977) and JAMES MADISON, *MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS* (1785), *reprinted in* RELIGION AND THE CONSTITUTION 51, 51 (Michael W. McConnell et al. eds., 2011)).

189. Kuby & Kunstler, *supra* note 127, at 1021.

resonant ideals: democratic legitimacy, self-determination, and liberty.”¹⁹⁰ The suffragists understood from the start of the picketing campaign that by highlighting the hypocrisy of President Wilson’s promotion of democratic values abroad while denying full democratic participation at home, they could check the administration’s ability to garner support for his war efforts.¹⁹¹ By engaging in unruly constitutional citizenship, the suffragists were able to highlight the injustice of their plight once arrested.

Upon arrest, when prison officials began denying the suffragist prisoners their most basic privileges, the women understood that they had little power to change their plight on their own. But they also understood they could harness the power of public opinion to force the hand of their captors.¹⁹² In this way, they used the tools available to them—the power to petition—to garner publicity to “turn the wheel of public opinion.”¹⁹³

The suffragist prisoners obviously saw their in-prison protests as part of their larger movement to become fully participating members of democratic society through the right to vote.

Soon after her release on November 27, [Alice] Paul sent out a press statement praising the picketing campaign: “How is it that people fail to see our fight as part of the great American struggle for democracy, a struggle since the days of the Pilgrims? We are bearing on the American tradition, living up to the American spirit.”¹⁹⁴

Today, we punish people by not only depriving them of their liberty but also—in almost every state—by disenfranchising them (sometimes forever). By ensuring that prisoner protest rights are protected, we afford prisoners a way to continue to participate in democracy—albeit in a much more limited manner than by exercising the right to vote.

190. Dodd, *supra* note 30, at 407.

191. *Id.* at 400.

192. *Id.*

193. NEUMAN, *supra* note 49, at 150. To be clear, I do not mean to suggest that the suffragist prisoners—in writing and circulating their petition—were acting within the confines of the proscribed written rules. They certainly were not, as evidenced by the necessity of smuggling the petition out of the Occoquan, *supra* at Part I.B., and the immediate and apparent retaliation the prisoners experienced, *id.* Nor do I mean to suggest that the First Amendment jurisprudence at the time would have given the prisoners legal cover for their actions—it would not. Nonetheless, the suffragist prisoners’ activities provide a compelling example as to why prisoners *should* be afforded the opportunity to engage in protest activities meant to draw attention to their in-prison plight.

194. Dodd, *supra* note 30, at 415.

2. Expanding the Marketplace of Ideas

The second value protected by the First Amendment that Professor DeGiorlami describes is the “Millian idea of rivalry among ideas as an avenue to truth.”¹⁹⁵ This purpose views First Amendment protections as a way to protect the “free trade in ideas” in order to steadily progress toward ethical and political truths.¹⁹⁶

Prisoners have no lesser need for the truth than free citizens, nor is the truth ascertained differently behind prison walls than across the street from them. Indeed, if one proceeds from the assumption that persons are in prison because they have erred in some way, then granting them the same tools possessed by the rest of us to search for truth is an unquestionable penological good.¹⁹⁷

In this era of criminal justice reform, as the nation struggles to determine how best to address the crisis of mass incarceration, it is critical that the voices of those most affected by the crisis are heard. Extending greater protection to prisoner speech would further these ends.

While the suffragist prisoners did not aim to reform the prisons in which they were housed, they did inspire public officials to take a closer look at what was happening inside the walls of Occoquan. For a brief moment in time, then, the suffragist prisoners made the conditions of Occoquan more transparent and exposed the truth of those conditions to members of the public. In this way, the suffragists contributed to the marketplace of ideas in two ways relevant to our inquiry. First, the suffragist prisoners increased transparency. Second, this increase in transparency opened the door for public officials to investigate and reform prison conditions.

Ultimately, the investigations spurred by the suffragists in-prison protests amounted to nothing more than pro forma reports not meant to produce meaningful change, and the public quickly forgot the plight of the prisoners still confined to Occoquan after the suffragists secured release. But, the takeaway for today’s prisoners is two-fold. First, by better protecting prisoners’ First Amendment rights, we can increase

195. DeGirolami, *supra* note 183, at 1471 (citing John Stuart Mill, *On Liberty*, in THE BASIC WRITINGS OF JOHN STUART MILL 3, 35 (2002)) (“No one can be a great thinker who does not recognize, that as a thinker it is his first duty to follow his intellect to whatever conclusions it may lead. Truth gains more even by the errors of one who, with due study and preparation, thinks for himself, than by the true opinions of those who only hold them because they do not suffer themselves to think.”).

196. DeGirolami, *supra* note 183, at 1471–72 (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

197. Kuby & Kunstler, *supra* note 127, at 1021.

transparency of the prisons and jails that confine more than 2.2 million people in this country by listening to and investigating prisoners' complaints about their conditions. Second, by amplifying and protecting prisoners' voices, we lend credibility to their stories and allow them to participate meaningfully in the conversations about criminal justice reform occurring today. Right now, we're experiencing a moment where politicians on both sides of the aisle are taking a critical look at criminal justice reform. But often the voices of those impacted most by the criminal justice system—those imprisoned within it who can describe its hard truths—are not given full weight or even heard in the political process. By providing greater protections for those voices, they can join the conversation. Without those voices, “in the aggregate, people who are richer, whiter, and not incarcerated, will enjoy greater access to the marketplace of ideas,” resulting in “a distorted mixture of viewpoints in public discourse because demographic factors correlate with viewpoints on at least some matters of public concern, especially ones involving criminal justice.”¹⁹⁸

3. Advancing Individual Identity and Autonomy

Finally, the third justification for the freedoms enshrined by the First Amendment, as identified by DeGirolami, “focuses on the importance of expressive and religious freedom for individual identity.”¹⁹⁹ This justification “is canonical for the conventional account of the First Amendment”²⁰⁰ and speaks “to the essence of what it meant to be a human person.”²⁰¹ By dehumanizing prisoners, we make it easier to ignore their plight. The suffragist prisoners recognized this dehumanization and also acknowledged the difficulties inherent to maintaining protest activities when subjected to retaliation: “however gaily you start out in prison to keep up a rebellious protest, it is nevertheless a terribly difficult thing to do in the face of the constant cold and hunger of undernourishment.”²⁰² By strengthening prisoners' ability to express themselves and demonstrate their own identities, we can further this final First Amendment value.

198. Bianchi & Shapiro, *supra* note 161, at 20.

199. DeGirolami, *supra* note 183, at 1472.

200. *Id.* at 1473.

201. *Id.*

202. ZHANISER & FRY, *supra* note 65, at 284.

B. *Modern Prisoner Protest*

Despite the lack of protections afforded to them under the First Amendment, many prisoners today still engage in forms of non-violent protest meant to draw attention to their plight.²⁰³ In recent years, prisoners have engaged in silent protests,²⁰⁴ work stoppages,²⁰⁵ and hunger strikes²⁰⁶ as a means to protest unconstitutional prison conditions. Oftentimes, the act of engaging in these forms of protest results in disciplinary punishment, “which can affect everything from [prisoner] classification to privileges to parole.”²⁰⁷ Under *Turner*, drafting, circulating, and signing petitions and engaging in work stoppages are not necessarily protected speech.²⁰⁸ Whether engaging in a hunger strike is protected speech depends on where a prisoner is incarcerated: while the Fifth Circuit has found that hunger strikes might “constitute protected activity in certain circumstances,” a federal court in Illinois reached the opposite conclusion.²⁰⁹

Even protected speech is often meaningless under *Turner*. Prisoners may describe unfavorable prison conditions to family and friends on the outside, but without political capital or the resources to find help to rectify those conditions, there is little those family and friends can do.²¹⁰ Prisoners may also attempt to challenge unconstitutional conditions in the courts but will face a number of formidable barriers to doing so, largely because of what David Shapiro calls “‘practical immunity’—effective insulation from suit that flows partly from formal immunity doctrines (such as absolute or qualified immunity) but primarily from other obstacles that insulate potential defendants from suit.”²¹¹ Such obstacles

203. Armstrong, *supra* note 123, at 226.

204. *Id.* at 228.

205. *Id.* at 226; *see also* German Lopez, *America’s prisoners are going on strike in at least 17 states*, VOX (Aug. 22, 2018), <https://www.vox.com/2018/8/17/17664048/national-prison-strike-2018> [<https://perma.cc/LQW5-AABK>].

206. Aviva Stahl, *Force-Feeding is Cruel, Painful, and Degrading—and American Prisons Won’t Stop*, NATION (Jun. 4, 2019), <https://www.thenation.com/article/force-feeding-prison-supermax-torture/> [<https://perma.cc/A2CL-QEL5>]; Josh Harkinson & Maggie Caldwell, *50 Days Without Food: The California Prison Hunger Strike Explained*, MOTHER JONES (Aug. 27, 2013), <https://www.motherjones.com/politics/2013/08/50-days-california-prisons-hunger-strike-explainer/> [<https://perma.cc/E7D8-XJAT>].

207. Armstrong, *supra* note 123, at 222.

208. *Id.* at 224.

209. *Id.* at 230 (citing *Stefanoff v. Hays Cty.*, 154 F.3d 523, 527 (5th Cir. 1998); *Birdo v. Dave Gomez*, No. 13-cv-6864, 2016 WL 6070173, at *6 (N.D. Ill. Oct. 17, 2016)).

210. *Id.* at 229–30.

211. Shapiro, *supra* note 23, at 1013.

include a lack of access to counsel²¹² and limitations imposed by the Prison Litigation Reform Act.²¹³ Thus, while some prisoners choose to engage in protest speech, they do so at tremendous risk of punishment and with little options available for meaningful, legal protest activity.

Some prisoner protest activity, however, has eventually led to meaningful reforms of prison conditions. For example, in 2011 and 2013, thousands of prisoners confined in Special Housing Units (SHUs) in California's prisons engaged in hunger strikes demanding relief from the brutal SHU conditions.²¹⁴ Garnering the attention of the Center for Constitutional Rights, an organization "dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights," the hunger-striking prisoners eventually formed the class challenging indeterminate solitary confinement in California.²¹⁵ The case settled in September 2015, but, in January 2019, the United States District Court for the Northern District of California determined that the constitutional violations continued and ordered an additional year of monitoring.²¹⁶ While the case is ongoing, large-scale reforms to the California SHUs have occurred, in large part because of the initial in-prison protest.

212. *Id.* at 1013–19.

213. Armstrong, *supra* note 123, at 231; *see also* Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America's Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. PA. J. CONST. L. 139, 139–40 (2008).

214. *See* Harkinson & Caldwell, *supra* note 206.

215. *See* Order Granting in Part Motion for Class Certification; Denying Motion to Intervene, Ashker v. Governor of California, No. C 09–5796 CW, 2014 WL 2465191, (N.D. Cal. Jun. 02, 2014) (No. 195, 233) (available at <https://ccrjustice.org/sites/default/files/assets/6.2.14%20Order%20Granting%20Class%20Cert.pdf> [<https://perma.cc/K6KF-XHNL>]).

216. *See* Order, Ashker v. Newsom, No. 09-cv-05796-CW (RMI), 2019 WL 330461 (N.D. Cal. Jan. 25, 2019) (No. 905) (available at <https://ccrjustice.org/sites/default/files/attach/2019/01/1122%202019-01-25%20Order%20Granting%20MTN%20to%20Extend%20SA%20for%2012%20Months.pdf> [<https://perma.cc/BA6D-V5YD>]).

V. CONCLUSION

*When the prison gates slam behind an inmate, he does not lose his human quality; his mind does not become closed to ideas; his intellect does not cease to feed on a free and open interchange of opinions; his yearning for self-respect does not end; nor is his quest for self-realization concluded. If anything, the need for identity and self-respect are more compelling in the dehumanizing prison environment. Whether an O. Henry writing his short stories in a jail cell or a frightened young inmate writing his family, a prisoner needs a medium for self-expression. It is the role of the First Amendment and this Court to protect those precious personal rights by which we satisfy the basic yearnings of the human spirit.*²¹⁷

Despite the above flowery affirmation from the United States Supreme Court almost 45 years ago, the federal courts, including the Supreme Court, have largely spent the following decades narrowing the First Amendment protections afforded to prisoners, as outlined in detail above.²¹⁸ By refusing to afford prisoners robust protections under the First Amendment, we are not only stripping prisoners of pieces of their identity, but we are ignoring two key values enshrined in the First Amendment: the ability of individual citizens to check the unadulterated power of their government and the promotion of democratic values through democratic participation. While prisoners, by virtue of their incarceration, are stripped of the most fundamental way to participate in democracy—the exercise of voting rights—prisoners are not stripped of their citizenship. Therefore, as citizens, they should retain the right to protest the exercise of abusive power in the opaqueness of institutions: the American prison. Yet modern First Amendment law as applied to prisoners fails to ensure the protection of these basic values.

This failure amplifies the societal harms caused by mass incarceration and the other abject miscarriages of justice that characterize our criminal justice system. The harms of mass incarceration are more acute when one accounts for the vastly disparate impact the criminal justice system has on communities of color.²¹⁹

217. *Procunier v. Martinez*, 416 U.S. 396, 427–28 (1974).

218. See generally Shapiro, *supra* note 23 (describing how the Supreme Court's 1987 decision in *Turner v. Safley* gave lip-service to the idea that prisoners are not without constitutional protections behind the prison gates but, in the end, gave prisoners virtually no First Amendment protections).

219. Lindsey Webb, *Slave Narratives and the Sentencing Court*, 42 N.Y.U. REV. L. & SOC. CHANGE 125, 129 (2018).

There is a dramatic racial disparity in the United States' criminal justice system, where African American people are incarcerated at 5.1 times the rate of whites, and Latino people at 1.4 times the rate of whites at the state level. In federal prisons, African American people constitute 38% of the incarcerated population—a percentage that is almost triple the proportion of African American people in the general population.²²⁰

In addition to these racial disparities, the past quarter century has witnessed a 750% increase in the number of incarcerated women.²²¹ Like the broader criminal justice system, women of color are imprisoned at a higher rate than white women.²²² Thus, strengthening the First Amendment protections afforded to prisoners will not only have a net positive impact on both the conditions inside our nation's prisons and jail but will also help ensure democratic participation for historically excluded and silenced groups. As the Silent Sentinels taught us, the voices of these groups must be heard.

220. *Id.* at 129–30.

221. The Sentencing Project, *Fact Sheet: Incarcerated Women and Girls*, at 1 (Jun. 06, 2019), <https://www.sentencingproject.org/publications/incarcerated-women-and-girls/> [<https://perma.cc/7E55-PSNV>].

222. *Id.* at 2.